

***In re Kay Struckman***

(July 2014, MPT-1) In this performance test item, examinees are associates at a law firm representing Kay Struckman, a local attorney. She has asked for legal advice on the proposed modification of her retainer agreements with existing clients. Specifically, Struckman wants to know whether she may ethically seek to modify her retainer agreements with existing clients to include a provision requiring the use of binding arbitration to resolve future fee disputes, and whether any resulting modification using the language she proposes would be legally enforceable. The task for examinees is to draft a memorandum for the supervising attorney addressing whether Struckman's proposed arbitration clause is ethical under the Franklin Rules of Professional Conduct and legally enforceable. The File contains the instructional memo from the supervising attorney and a letter from Struckman. The Library contains Franklin Rule of Professional Conduct 1.8, an ethics opinion from the Columbia State Bar Association, two Franklin cases, and an Olympia case.

**MINNESOTA BAR EXAMINATION  
JULY 2014  
REPRESENTATIVE GOOD ANSWER  
MPT1**

TO: Steve Ramirez

FROM: Examinee

DATE: July 29, 2014

RE: Kay Struckman consultation – Modification to Retainer Agreements

I. Introduction:

Ms. Struckman seeks the advice of our firm to determine whether she may properly modify her retainer agreements with her existing clients to include a provision requiring binding arbitration to resolve future fee disputes. Additionally, Ms. Struckman would like to know what is necessary to ensure that the modifications are legally enforceable. The following memorandum considers both of Ms. Struckman's questions and concludes that it is legally possible for her to modify her retainer agreements; however, the modification is considered a business transaction and certain steps must be followed to modify the agreements properly. The second part of this memorandum details the language Ms. Struckman must use for the arbitration agreement to be legally enforceable. Please note that the cases discussed within the memorandum include both in-state and out-of-state opinions (*Sloan v. Davis*, 2009, is from the Olympia Supreme Court)

II. It is ethically possible for Ms. Struckman to modify her retainer agreements with existing clients.

Ms. Struckman may properly modify her retainer agreement with existing clients. Modification of a retainer agreement amounts to a business transaction under Franklin Rules of Professional Conduct 1.8. Under FRPC 1.8, a lawyer shall not enter into a business transaction with a client unless certain steps are met to ensure the protection of the client. First, the transaction and terms of the agreement must be fair and reasonable to the client, as well as fully disclosed and transmitted in writing in a way that the client can reasonably understand. Second, the client must be advised in writing of the desirability of seeking independent legal advice, and the client must be given the opportunity to do so. Finally, the client must give informed consent in a signed written document. A lawyer shall not limit their liability to a client for malpractice unless the client is independently represented. See FRPC 1.8. In order for Ms. Struckman to modify the retainer agreement, a business transaction, she must meet each of the requirements of FRPC 1.8.

A recent decision in the Olympia Supreme Court addressed the standards that an attorney must adhere to when entering into business transactions. (*Sloane v. Davis*, 2009). In *Sloane*, the court considered a retainer agreement that provided for binding arbitration between an attorney and her client. The court listed the three requirements contained in FRPC 1.8 and addressed each provision independently in determining that the attorney had met her burden (note that Olympia has an identical Professional Conduct rule). The attorney's conduct in *Sloane* provides an example of the steps Ms. Struckman will need to take in making a business transaction with a client. First, the attorney orally explained the retainer agreement, mailed a copy of the agreement, and mailed a brochure explaining the agreement to the client. The brochure explained what would be arbitrated, as well as the rights given up by the client and the procedures arbitrators follow. Additionally, the brochure explained that the client could and should seek the advice of independent counsel, and gave the client a week to seek such legal advice. The court concluded that even in the absence of the client seeking legal advice, the attorney had met her burden under Rule 1.8. The client-plaintiff in *Sloane* also argued that attorneys should not be permitted to use arbitration to avoid litigation for public policy reasons, but the court disagreed with this argument finding that clients often benefit from arbitration processes because of the speed and cost-effectiveness.

The language Ms. Struckman has provided does not meet the burden of FRPC 1.8. The language she provided does not provide the quality of information that the attorney in *Sloan* did. It does not explain to the client the rights the client is giving up or an explanation of the arbitration process. It also fails to inform the client that the client should seek independent legal advice or give the client notice that they have an amount of time to do so. Finally, the provision Ms. Struckman provided does not have a place for the client to sign showing consent to the provision. Because of this, the language she proposed is not sufficient.

In order to meet the requirements, Ms. Struckman should follow steps similar to the attorney in *Sloan*. She should explain orally, as well as prepare a brochure, explaining the agreement, what would be arbitrated, the rights given up by the client, and the arbitration process. Additionally, the document should contain a sentence urging the client to seek independent legal advice. It would also be proper for the attorney to give the client at least a couple of days if not a week to obtain that independent legal advice. Finally, Ms. Struckman needs a document that the client can sign to consent to the provision. It is important to consider overall, that the modification must be fair and reasonable to the client. On first glance, it appears that such a provision would be, especially considering that Ms. Struckman will waive fee increases for the next two years. It may be beneficial to look further into the reasonableness of this provision though to ensure that it would hold up against an allegation of unreasonableness.

It should be noted, that the neighboring state of Columbia also has an identical provision limiting an attorney's ability to enter into business transactions. The Columbia Ethics Committee released an ethics opinion in 2011 detailing some of the concerns involved with a lawyer's modification of a retainer agreement with an existing client to include provisions requiring binding arbitration of future malpractice claims. While the

opinion concludes that a lawyer cannot meet the requirement of Rule 1.8 in making such a modification, it is important to note that the opinion concerns arbitration for future *malpractice* claims. Ms. Struckman's proposed modification involves fee disputes, not malpractice claims, so the opinion does not appear to preclude Ms. Struckman for modifying her agreements solely for fee disputes. The ethics opinion seemed most concerned with the improbability that a client would get independent counsel in the midst of lawyer's representation. While this still may be a concern, the concern may be less when dealing with fee arrangements as opposed to malpractice claims. The idea of a malpractice claim may be foreign to many clients, while a fee arrangement is common in all types of business.

If Ms. Struckman creates a fair and reasonable agreement, fully discloses the terms of the agreement in a reasonably understandable way, advises the client in writing to seek independent legal advice, gives the client reasonable time to seek advice, and obtains written, signed consent from her clients, she may properly modify her retainer agreements.

### III. Ms. Struckman must follow five minimum requirements to ensure that her arbitration agreements are legally enforceable.

In order to make a provision for arbitration of future fee disputes legally enforceable, Ms. Struckman will need to follow certain steps explained in Franklin judicial opinions. To begin, it is important to note that the language of agreements is interpreted most strongly against the party who created uncertainty in the provision. (*Lawrence v. Walker*, 2006). Any language included in the provision must be clear and unambiguous.

Additionally, in (*Johnson v. LM Corporation*, 2004), the Franklin Court of Appeals stated five minimum requirements for legally enforceable agreements requiring binding arbitration including that the arbitration agreement must: (1) provide for a neutral arbitrator, (2) provide for more than minimal discovery, (3) require a written, reasoned decision, (4) provide for all of the types of relief that would otherwise be available in court, and (5) not require employees to pay unreasonable fees or costs as a condition of access to the arbitration forum. *Johnson citing Lafayette v. Armstrong*, Fr. Sup. Ct. 1999. While the *Johnson* decision involved an employment agreement between employer and employee, the *Lawrence* court compared the employer-employee relationship to the attorney-client relationship and found that the fiduciary duties between the two were analogous. As currently written, Ms. Struckman's provision does not contain any of these five requirements.

The *Johnson* court went through each of the requirements to determine whether the language of the employer's agreement satisfied them. First, the court found that because the arbitration agency that was listed in the agreement required its arbitrators to disclose any conflicts of interest, the first requirement was met. Second, the court found that limiting the employees to three depositions met the second requirement because other avenues of discovery were still open. Third, the court found that the Franklin Supreme Court's ruling that arbitrators have a written decision was enough to

provide that such a written document would be created. Although the court did not specifically address the fourth factor, it did state that it must assume that arbitrators will follow the law. Such an assumption leads to the conclusion that arbitrators will provide for all types of relief available in a court. Finally, a court considered whether the final requirement – “no reasonable fees” - would be required. The court determined that the record was unclear as to what fees and costs were, and because it was possible that exorbitant fees could frustrate employees’ abilities to pursue a claim, the court remanded the case to develop a more conclusive record.

To make her agreement legally enforceable, Ms. Struckman will need to mimic the provisions of the employers in the Johnson case. She should consider choosing an arbitration agency like the FAA that is well known and contains provisions that require its arbitrators to make known their conflicts of interest. Additionally, she should have provisions that allow for discovery between parties, although that discovery may be limited in some regards as long as additional avenues are left open. Although the court would likely find an agreement enforceable without it, she may also want to include a provision that the arbitrator must provide for all types of relief that would be otherwise available in court and create a written, reasoned decision. Finally, Ms. Struckman should include a provision to ensure that clients are not required to pay an unreasonable amount of fees or costs. The firm should consider doing more research on this point in particular before meeting with Ms. Struckman to determine what sort of fee arrangements have been deemed reasonable in past court decisions. If Ms. Struckman completes these steps she should have a valid, enforceable provision allowing her to modify her agreements to provide for arbitration of future fee disputes.

***In re Linda Duram***

(July 2014, MPT-2) Examinees' law firm represents Linda Duram, whose request for leave under the Family and Medical Leave Act (FMLA) was denied by her employer, Signs Inc. Duram had requested five days' leave to accompany her grandmother, who suffers from severe health issues, to an out-of-town funeral. Signs Inc. denied the request, asserting that the FMLA did not entitle an employee to leave to care for a grandparent; applied only to caring for someone in the person's home or a hospital, not to travel; did not apply to funeral leave; and required 30 days' notice. When Duram returned from the funeral, Signs Inc. told her that it would dock her pay for the unauthorized leave and that any future unapproved absences would result in termination. Examinees' task is to draft a demand letter to Signs Inc. persuading it to reverse its denial of leave and retract the threat of termination. In doing so, examinees must set forth the case for why Duram was entitled to FMLA leave and address Signs Inc.'s specific objections. The File contains the instructional memorandum, the firm's guidelines for drafting demand letters, email correspondence between Duram and Signs Inc., an affidavit by Duram, and a letter from the physician treating her grandmother. The Library contains excerpts from the FMLA, excerpts from the Code of Federal Regulations, and two cases.

**MINNESOTA BAR EXAMINATION  
JULY 2014  
REPRESENTATIVE GOOD ANSWER  
MPT2**

Steven Glenn, Vice President Human Resources

July 29, 2014

Dear Mr. Glenn:

My firm is representing your employee, Ms. Linda Duram, in her recent Family Medical Leave Act (FMLA) claim. I am writing to you to explain Ms. Duram's position in more detail and provide you with some supporting documentation regarding her FMLA claim (see attached) which I hope will help you re-evaluate your denial of Ms. Duram's request.

As you are aware, Ms. Duram requested five days of FMLA leave on July 7, 2014 so that she could accompany her grandmother to Franklin City to attend the funeral of Ms. Duram's grandmother's sister. Ms. Duram's grandmother, Emma Baston, is disabled and dependent on a wheelchair and oxygen; she required travel assistance from a caregiver familiar with her conditions and treatment. Her treating physician, Dr. Maria Oliver, M.D., believed that Ms. Duram was the suitable caregiver to travel with Ms. Baston. Mr. Duram's request was denied on the same day the request was made. When Ms. Duram returned to work on July 6, 2014, she was informed that she would be denied pay.

I have reviewed your response to Ms. Duram's initial request for leave that contains your specific objections and I would like to address of these in more detail below.

The FMLA does apply to grandparents who have stood *in loco parentis* to an employee. The FMLA's leave provisions extend to the care of parents who have serious health conditions. (FMLA 2612 (a) (1) (C)). The FMLA defines the term parent broadly to include those who stood *in loco parentis* to an employee (FMLA 2611 (7)). Moreover, the federal regulations implementing the FMLA require employers to grant leave to eligible employees who need to care for, among others, parents with serious health conditions. (CFR 825.112 (a) (3)).

Although the FMLA does not define "*in loco parentis*," Franklin state law defines it as someone who actually and intentionally put herself in the position of a parent by assuming parental obligations, even though such individual does not go through a formal adoption, guardianship, or custody process. (*Carson*). In *Phillips v. Franklin City Park District*, the Franklin Court of Appeals found sufficient proof of an *in loco parentis* relationship when a grandmother accepted her four-year-old grandson into her home, enrolled him in school, attended his parent-teacher conferences, served as driver for his

Cub Scout Troop, obtained medical care for him, and supported him financially. The 15<sup>th</sup> Circuit contrasted this type of arrangement with the one presented in *Carson v. Houser Mfg., Inc.*, where a grandfather merely housed his grandson for weekends and extended vacations and provided some financial support during college.

Emma Baston stood *in loco parentis* for Ms. Duram. She and Ms. Duram's grandfather took her and her brother into their home on several occasions between the time that Ms. Duram was in elementary school and her time in high school. These time periods ranged from months to years. Ms. Baston took care of Ms. Duram, provided her with food and clothing, and took her to school and to doctor's appointments. This sort of relationship, characterized by extended periods of cohabitation and day-to-day financial and emotional support, is distinguishable from other grandparent-grandchild relationships that the 15<sup>th</sup> Circuit has found not to be *in loco parentis* relationships, such as the one in *Carson*.

The FMLA covers serious health conditions, which may include care in a hospital or other facility, but can also include "continuing treatment by a health care provider." (FMLA 2611 (11) (B); CFR 825.113 (a)). Treatment is defined broadly in the federal regulations to include courses of antibiotics and other medications, as well as "therapy requiring special equipment to resolve or alleviate the health condition." (CFR 825.113 (c)). Continuing treatment includes treatment for chronic conditions defined as requiring visits to a health care provider at least twice a year and continuing over an extended period of time. (CFR 825.115 (c) (1) – (2)).

It is indisputable that Ms. Baston was undergoing continuous treatment for her chronic health conditions at the time Ms. Duram requested leave. During the time period for which Ms. Duram requested FMLA leave, she not only helped her grandmother with mobility and personal care, she also administered medications and oxygen and operated a device to pump fluids from Ms. Baston's heart. For your reference, a letter from Ms. Baston's physician, which lays out this sophisticated treatment regimen, is attached.

Ms. Duram's act of accompanying her grandmother to a funeral does not alter the fact that she was providing her grandmother with necessary medical treatment.

In *Shaw v. BG Enters.*, the 15<sup>th</sup> Circuit adopted from other circuit courts two standards for evaluating whether a family member is "caring for" another: the 9<sup>th</sup> Circuit "close and continuous proximity" standard from *Tellis v. Alaska Airlines*, and the 12<sup>th</sup> Circuit "actual care standard" from *Roberts v. Ten Pen Bowl*. Under the *Tellis* standard, a family member must remain in physical proximity to the person they are caring for. The *Roberts* case added the requirement that the caregiving family members administer or provide some actual medical treatment to the person they are caring for.

The court in *Shaw* relied on these two opinions to deny a father FMLA leave for activities like preparing his home to receive his daughter who had been rendered severely disabled in a car accident and, ultimately, denied him leave to attend her



funeral. The key point regarding the funeral in *Shaw*, however, was that under the close and continuing care or actual care standards, such care must be provided to a living person and does not extend to attending the funeral of the cared-for family member herself. In contrast, Ms. Duram did not seek leave to attend the funeral of the grandmother who stood *in loco parentis* for her; she sought leave to provide close and continuous actual care to her grandmother at a time when her grandmother needed her help.

It was not practicable, under these circumstances, for Ms. Duram to provide Signs Inc. with 30 days' notice.

The FMLA's provisions dealing with notice address situations in which the need for leave will be foreseeable, such as for a birth. (FMLA 2612 (e) (1). The federal regulations explicitly state that this notice must only be given if practicable, and providing notice as soon as possible will be sufficient for changes in circumstances or medical emergencies. (CFR 825.302 (a)). Ms. Duram was merely required to provide sufficient information to describe her need for FMLA leave (CFR 825.303 (b)), which she did in her July 7<sup>th</sup> email when she explained her grandmother's serious health problems and dependency on medications and therapies.

On the basis of the above points, Ms. Duram requests that her request for leave be retroactively re-evaluated, that her probation be lifted, and that she be restored the payment she would have been due, had her leave been granted. In addition, Ms. Duram requests assurances that Signs Inc. acknowledge her need to provide care for her ailing grandmother and assurance that any future requests she may make regarding leave to care to her grandmother will be handled in a more compassionate manner.

Sincerely,

Henry Fines

### **MEE Question 1**

While on routine patrol, a police officer observed a suspect driving erratically and pulled the suspect's car over to investigate. When he approached the suspect's car, the officer detected a strong odor of marijuana. The officer immediately arrested the suspect for driving under the influence of an intoxicant (DUI). While the officer was standing near the suspect's car placing handcuffs on the suspect, the officer observed burglary tools on the backseat.

The officer seized the burglary tools. He then took the suspect to the county jail, booked him for the DUI, and placed him in a holding cell. Later that day, the officer gave the tools he had found in the suspect's car to a detective who was investigating a number of recent burglaries in the neighborhood where the suspect had been arrested.

At the time of his DUI arrest, the suspect had a six-month-old aggravated assault charge pending against him and was being represented on the assault charge by a lawyer.

Early the next morning, upon learning of her client's arrest, the lawyer went to the jail. She arrived at 9:00 a.m., immediately identified herself to the jailer as the suspect's attorney, and demanded to speak with the suspect. The lawyer also told the jailer that she did not want the suspect questioned unless she was present. The jailer told the lawyer that she would need to wait one hour to see the suspect. After speaking with the lawyer, the jailer did not inform anyone of the lawyer's presence or her demands.

The detective, who had also arrived at the jail at 9:00 a.m., overheard the lawyer's conversation with the jailer. The detective then entered the windowless interview room in the jail where the suspect had been taken 30 minutes earlier. Without informing the suspect of the lawyer's presence or her demands, the detective read to the suspect full and accurate Miranda warnings. The detective then informed the suspect that he wanted to ask about the burglary tools found in his car and the recent burglaries in the neighborhood where he had been arrested. The suspect replied, "I think I want my lawyer here before I talk to you." The detective responded, "That's up to you."

After a few minutes of silence, the suspect said, "Well, unless there is anything else I need to know, let's not waste any time waiting for someone to call my attorney and having her drive here. I probably should keep my mouth shut, but I'm willing to talk to you for a while." The suspect then signed a Miranda waiver form and, after interrogation by the detective, made incriminating statements regarding five burglaries. The interview lasted from 9:15 a.m. to 10:00 a.m.

In addition to the DUI, the suspect has been charged with five counts of burglary.

The lawyer has filed a motion to suppress all statements made by the suspect to the detective in connection with the five burglaries.

The state supreme court follows federal constitutional principles in all cases interpreting a criminal defendant's rights.

1. Did the detective violate the suspect's Sixth Amendment right to counsel when he questioned the suspect in the absence of the lawyer? Explain.
2. Under Miranda, did the suspect effectively invoke his right to counsel? Explain.
3. Was the suspect's waiver of his Miranda rights valid? Explain.

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MEE1**

**Suspect's Sixth Amendment Right to Counsel:**

The detective did not violate the suspect's Sixth Amendment right to counsel when he questioned the suspect in the absence of the lawyer. The issues here are whether the lawyer can invoke the Sixth Amendment right to counsel on a suspect's behalf, whether suspect properly invoked his right, and whether representation on one charge gives the suspect a Sixth Amendment right to counsel on other charges.

The Sixth Amendment of the U.S. Constitution, which is applicable to the States through the 14<sup>th</sup> Amendment, provides that a suspect charged in a criminal case has a right to have an attorney present throughout all critical stages of a criminal prosecution. This includes post-charge line-ups, jury selection, trial, etc. It also includes charge-specific interrogations if the suspect has been charged and has invoked his right to an attorney.

Here, the suspect was questioned about a recent string of burglaries. When the lawyer arrived at the jail, the suspect had not yet been charged with anything related to burglary. The only charge that the lawyer was representing the suspect on was a six-month-old aggravated assault charge that was pending against him. The Sixth Amendment right to counsel is charge specific, meaning (in this case) that it does not prevent questioning about an unrelated crime or charge just because the suspect is represented by an attorney on another matter. Rights under the Sixth Amendment belong to the suspect, not to the attorney, and they must be invoked by the suspect. Therefore, the fact that the lawyer told the jailer that she wanted to speak to the suspect and that the suspect should not be questioned before she speaks to him did nothing to invoke the client's Sixth Amendment rights.

Since the client did not unambiguously request to see his attorney, or unambiguously invoke his right to remain silent, and since the lawyer was not representing the client on the charge of burglary at the time of the detective's questioning of the suspect about the burglary, the detective's questioning was proper and did not violate suspect's Sixth Amendment rights.

**Did the Suspect Effectively Invoke His Right to Counsel Under Miranda?**

No, the suspect did not effectively invoke his rights to counsel under Miranda. The issue here is whether the suspect unambiguously invoked his rights.

The Supreme Court has held that before a criminal suspect can be subjected to custodial interrogation, he must be made aware of certain rights, known as the Miranda rights (named after the court case in which they were established). These rights are

deemed to arise under the 5<sup>th</sup> Amendment of the Constitution and are applicable to the states through the 14<sup>th</sup> Amendment. Before custodial interrogation, the government must inform a criminal suspect that he has the right to remain silent, anything he says can and will be used against him in a court of law, he has a right to an attorney, and if he cannot afford an attorney one will be provided for him. If a criminal suspect unambiguously invokes his or her right to remain silent, all questioning must cease at that time. If a reasonable amount of time then passes, the government then may re-Mirandize the suspect and question again about matters unrelated to the initial investigation. If a suspect invokes his or her right to an attorney, however, all questioning must cease until an attorney is provided.

A crucial aspect of the rule set out above is that a criminal suspect must unambiguously invoke his or her rights under Miranda. If a suspect does not do so unambiguously, the police are under no duty to seek clarification or to cease questioning until the suspect has made him or herself clear. Here, the suspect merely said that "he thinks" he wants to talk to his lawyer. The detective then responded "that's up to you," and the suspect then eventually broke the ensuing silence by saying that "...I should probably keep my mouth shut, but I'm willing to talk to you for a while." This was not an unambiguous invocation of his Miranda rights, and actually invited further questioning.

### **Was the Suspect's Waiver of His Miranda Rights Valid?**

Yes, the suspect's waiver of his Miranda rights was valid. The issue here is whether the waiver was knowing and voluntary.

After agreeing to "talk to [the detective] for a while," the suspect signed a Miranda waiver form and made incriminating statements regarding five burglaries. Waivers of Miranda rights are effective if they are knowing and voluntary. In this case, the suspect had been read his rights and there is no reason to believe that he did not understand them. In fact, he even referenced invoking his rights ambiguously, which is evidence of that fact that he understood that he did not necessarily have to talk to the detective. He also signed a form waiving his rights. Doing this after being informed of one's rights is strong evidence of a knowing and voluntary waiver. Furthermore, this suspect had been subject to the criminal justice system before because of his aggravated assault charge, which is further evidence that the suspect would understand what his rights are during an interrogation and that he did not need to waive his Miranda rights if he did not want to. The suspect's waiver was valid.

### **MEE Question 2**

A music conservatory has two concert halls. One concert hall had a pipe organ that was in poor repair, and the other had no organ. The conservatory decided to repair the existing organ and buy a new organ for the other concert hall. After some negotiation, the conservatory entered into two contracts with a business that both repairs and sells organs. Under one contract, the business agreed to repair the existing pipe organ for the conservatory for \$100,000. The business would usually charge a higher price for a project of this magnitude, but the business agreed to this price because the conservatory agreed to prepay the entire amount. Under the other contract, the business agreed to sell a new organ to the conservatory for the other concert hall for \$225,000. As with the repair contract, the business agreed to a low sales price because the conservatory agreed to prepay the entire amount. Both contracts were signed on January 3, and the conservatory paid the business a total of \$325,000 that day.

Two weeks later, before the business had commenced repair of the existing organ, the business suffered serious and unanticipated financial reversals. The chief financial officer for the business contacted the conservatory and said,

Bad news. We had an unexpected liability and as a result are in a real cash crunch. In fact, even though we haven't acquired the new organ from our supplier or started repair of your existing organ, we've already spent the cash you gave us, and we have no free cash on hand. We're really sorry, but we're in a fix. I think that we can find a way to perform both contracts, but not at the original prices. If you agree to pay \$60,000 more for the repair and \$40,000 more for the new organ, we can probably find financing to finish everything. If you don't agree to pay us the extra money, I doubt that we will ever be able to perform either contract, and you'll be out the money you already paid us.

After receiving this unwelcome news, the conservatory agreed to pay the extra amounts, provided that the extra amount on each contract would be paid only upon completion of the business's obligations under that contract. The business agreed to this arrangement, and the parties quickly signed documents reflecting these changes to each contract. The business then repaired the existing organ, delivered the new organ, and demanded payment of the additional \$100,000.

The conservatory now has refused to pay the business the additional amounts for the repair and the new organ.

1. Must the conservatory pay the additional \$60,000 for the organ repair? Explain.
2. Must the conservatory pay the additional \$40,000 for the new organ? Explain.

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REPRESENTATIVE GOOD ANSWER  
MEE2**

1. The issue is whether or not the modification to the original contract for organ repair was valid under the common law. Because the contract for organ repair involved a service, namely organ repair, the common law governs. Although some of the businesses services were for goods, there were two separate contracts (one for goods and one for services) which should be analyzed separately. Under the common law, contract modifications require new consideration. The music conservatory offered new consideration but the business did not. The likely consideration the business would point to is carrying out the organ repair. However, the business already had a pre-existing duty to repair the organ and offering to perform a duty which a party is already obligated to perform is not consideration. Therefore, the attempted modification likely fails under the common-law for lack of consideration and the conservatory is not obligated to pay the additional \$60,000 for the organ repair contract.

The business might try to argue that it would have been impossible to perform the original contract due to lack of funds so they are due the \$60,000 under an unjust enrichment theory. Under that theory, a plaintiff is entitled to payment if they confer value to the defendant, in reliance on defendant's promise to pay (or reasonable expectation defendant would pay), defendant knows that plaintiff so relied, and it would be unfair to let the defendant keep the value with paying. Although business arguably meets the first three requirements (the business provided repairs worth more than original contract price, the conservatory promised to pay, and might have foreseen the business relying on that promise) it would not be unfair to refuse to force the conservatory to pay. The parties negotiated the contract price, including the reduction in price for upfront payment, and assumed the risk for the obligations they were incurring. The business likely has no legal enforcement method to recover the \$60,000 for the organ repair from the conservatory.

2. The second contract between the parties was for a new organ. Because the organ is a good (movable personal property) Article 2 of the UCC applies. The issue for this contract is whether the modification of the original contract was valid under the UCC. The UCC allows for contract modifications if they are undertaken in good faith. A modification that is agreed to in good faith is valid even without new consideration. In this case, the modification request from the company came after they began experiencing financial difficulties. Purportedly, the difficulties arose from an unforeseen liability. Under those circumstances, a court would likely find that the business was requesting a modification in good faith. If it turned out that the company knew the problems were coming up, or were reckless with how they were spending the money, they likely wouldn't be requesting a modification in good faith. The conservatory would likely argue that the business should have held onto their

payments to perform the work under the contract and to do otherwise is acting in bad faith. However, if the liability really was unexpected, the modification request was likely made in good faith and the modification is enforceable under the UCC. Thus the conservatory must pay the additional \$40,000.

The conservatory might try to argue that the modification should be void due to economic duress. However, economic duress requires that there is no reasonable alternative for the party other than agreeing to the new contract (or modification). In this case, the conservatory likely had other options. They could have bought an organ from a different company and sued the business for breach of contract, they also could likely have waited until the business was financially able to perform under the contract (it does not appear speed was necessary given that one of the halls had no organ and the other had lapsed into poor repair). Because the conservatory likely has no viable defense, and the modification was made in good faith, they are obligated to pay the conservatory the additional \$40,000 for the new organ.



**MEE Question 3**

In 1994, a man and a woman were married in State A.

In 1998, their daughter was born in State A.

In 2010, the family moved to State B.

In 2012, the husband and wife divorced in State B. Under the terms of the divorce decree:

- (a) the husband and wife share legal and physical custody of their daughter;
- (b) the husband must pay the wife \$1,000 per month in child support until their daughter reaches age 18;
- (c) the marital residence was awarded to the wife, with the proviso that if it is sold before the daughter reaches age 18, the husband will receive 25% of the net sale proceeds remaining after satisfaction of the mortgage on the residence; and
- (d) the remaining marital assets were divided between the husband and the wife equally.

Six months ago, the husband was offered a job in State A that pays significantly less than his job in State B but provides him with more responsibilities and much better promotion opportunities. The husband accepted the job in State A and moved from State B back to State A.

Since returning to State A, the husband has not paid child support because, due to his lower salary, he has had insufficient funds to meet all his obligations.

One month ago, the wife sold the marital home, netting \$10,000 after paying off the mortgage. She then moved to a smaller residence. The husband believes that he should receive more than 25% of the net sale proceeds given his financial difficulties.

Last week, when the wife brought the daughter to the husband's State A home for a weekend visit, the husband served the wife with a summons in a State A action to modify the support and marital-residence-sale-proceeds provisions of the State B divorce decree. The husband brought the action in the State A court that adjudicates all domestic relations issues.

1. Does the State A court have jurisdiction to modify
  - (a) the child support provision of the State B divorce decree? Explain.
  - (b) the marital-residence-sale-proceeds provision of the State B divorce decree? Explain.
2. On the merits, could the husband obtain
  - (a) retroactive modification of his child support obligation to the daughter? Explain.
  - (b) prospective modification of his child support obligation to the daughter? Explain.
  - (c) modification of the marital-residence-sale-proceeds provision of the State B divorce decree? Explain.

**MINNESOTA BAR EXAMINATION  
JULY 2014  
REPRESENTATIVE GOOD ANSWER  
MEE3**

- (a) Jurisdiction in a court requires both personal jurisdiction and subject matter jurisdiction. Personal jurisdiction concerns contact, relatedness, and fairness. Contact involves personal availment and foreseeability; relatedness can be general (the state has jurisdiction over you in your domicile) or specific (the conduct in that state led to the issue at hand). Fairness considers the interests of the parties and the state. The contact should be enough so that the traditional notions of fair play and substantial justice are not offended and due process is not violated. Subject matter jurisdiction is about whether the case should be in state or federal court. Family law issues often arise in state court. Service seems to be proper as wife was in the state when served. Here the question is regarding which state court should be able to modify a divorce decree. The State A court does not have jurisdiction to modify the child support provision. While a divorce filing requires just personal jurisdiction over one spouse, these other matters in the divorce decree have different requirements. First, the full faith and credit clause of the U.S. Constitution requires that the judgments of a court of one state be respected by other state's courts. This requires that State A respect the judgments of State B. In addition, child support provisions are modifiable based on changes in circumstances, but jurisdiction over the child support requirements is where the child has domicile. Domicile involves both presence and intent to remain. At this time, the child lives in State B, and presumably intends to stay there with mom as the child only spends weekends with the dad in State A, despite mom and dad sharing legal and physical custody. In addition, much of the evidence regarding support of the child's needs may be in State B. While the information regarding dad's job is in State A, the necessities of the child and the home are in State B giving good reason to keep the child there. If the child had moved to State A, State B could also have jurisdiction because mom still lives there and the child lived there within the last 6 months. State B retains jurisdiction to modify the original divorce decree.
- (b) The State A court does not have jurisdiction over the marital residence provision. Parts of divorce decrees that have to do with the land should be litigated in the state where the land is, here State B is the location of the marital residence. In addition, State A must afford full faith and credit under the full faith and credit clause of the U.S. Constitution. In this case, the house has already been sold, so the need to be where the land is may be a bit more fuzzy. This is because the issues in the case become about whether the divorce decree gave enough of the sale proceeds to the dad which does not concern the place of the residence, but instead whether the dad should have received more than 25 %. Should dad received more based on a change in circumstances? Still, the information about

whether it was a valid sale and what the proceeds are, are all in State B and the original divorce decree is from State B.

- (a) The husband cannot obtain retroactive modification of child support obligations. The issue is whether a child support obligation can be retroactively modified. While child support modifications are available in a change of circumstances, they cannot be retroactive. Those obligations have already manifested and are already owed even if the dad's salary has decreased. In order to get a modification, dad must get a court order, and cannot stop paying and ask for retroactive reductions.
- (b) Dad may be able to get prospective modification of child support. The level of child support that is required will look to the needs of the child (does child participate in sports or have special needs, or are the child's needs able to be met with less support), where the child lives most of the time (if child lived more with mom or with dad that could change the support level), and what is mom's income or potential for income. The court will consider what the best interests of the child are. Dad has a new job with lower pay which is a change in circumstances that may lead to lowered child support payments. On the other hand, he took that job voluntarily with the idea that it had better promotion opportunities presumably with higher pay. The court would have to weigh whether these promotions were years away, and whether the voluntariness weighs against lowering the payments. In addition, the court will have to discuss the needs of the child and whether the needs can be met with less support.
- (c) Dad will likely not get a modification of the marital residence proceeds. Mom paid off the mortgage. If this was significant, the court will consider whether this means the division of marital assets was proper. A voluntary change in circumstances does not affect the reasons why the original divorce decree only gave husband 25%. A divorce decree won't be set aside unless there was not full disclosure, or some other major problem.

#### **MEE Question 4**

The United States Forest Service (USFS) manages public lands in national forests, including the Scenic National Forest. Without conducting an environmental evaluation or preparing an environmental impact statement, the USFS approved a development project in the Scenic National Forest that required the clearing of 5,000 acres of old-growth forest. The trees in the forest are hundreds of years old, and the forest is home to a higher concentration of wildlife than can be found anywhere else in the western United States.

The USFS solicited bids from logging companies to harvest the trees on the 5,000 acres of forest targeted for clearing, and it ultimately awarded the logging contract to the company that had submitted the highest bid for the trees. However, the USFS has not yet issued the company a logging permit. Once it does so, the company intends to begin cutting down trees immediately.

A nonprofit organization whose mission is the preservation of natural resources has filed suit in federal district court against the USFS. The nonprofit alleges that the USFS violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement for the proposed logging project. Among other remedies, the nonprofit seeks a permanent injunction barring the USFS from issuing a logging permit to the logging company until an adequate environmental impact statement is completed. The nonprofit believes that the logging project would destroy important wildlife habitat and thereby cause serious harm to wildlife in the Scenic National Forest, including some endangered species.

Assume that federal subject-matter jurisdiction is available, that the nonprofit has standing to bring this action, and that venue is proper.

1. If the logging company seeks to join the litigation as a party, must the federal district court allow it to do so as a matter of right? Explain.
2. What types of relief could the nonprofit seek to stop the USFS from issuing a logging permit during the pendency of the action, what must the nonprofit demonstrate to obtain that relief, and is the federal district court likely to grant that relief? Explain.

**MINNESOTA BAR EXAMINATION  
JULY 2014  
REPRESENTATIVE GOOD ANSWER  
MEE4**

- I. The Court must allow the logging company to join the litigation as a matter of right.

A party may join as a matter of right when either a statutory right exists, or when the court cannot enter a complete adjudication without the party's presence. This occurs when the requesting party is asserting an interest related to the litigation and adjudication without that party's presence would impair the party's ability to protect their interest, or when adjudicating the case without that party's presence would subject the party to multiple litigation or multiple claims.

In this case, there is no evidence that a statute exists granting the logging company authority to join the litigation as a matter of right. Furthermore, although the logging company is indeed asserting an interest related to the litigation, the logging company has not yet been awarded the permit. The Court would be able to fully adjudicate the case without the logging company's presence because the question is whether the USFS may grant a permit without first abiding by the guidelines articulated in the NEPA. Additionally, adjudicating this case on the merits without the logging company being a party would not subject the logging company to multiple claims or liabilities.

The logging company, however, may be able to establish that its interests would be materially impaired if the court were to adjudicate the case on the merits without its presence. If the court grants the permanent injunction requested by the nonprofit, the logging company may not receive the permit for quite some time, if at all. If the logging company already entered into other contracts based upon winning this bid, it may be able to show that its interests would be materially impaired without its presence.

The court, therefore, would most likely be mandated to allow the logging company to join in the suit.

- A. The nonprofit may petition the Court for a Temporary Restraining Order and Preliminary Injunction.

The nonprofit could immediately request that the court issue a temporary restraining order pending the preliminary injunction hearing.

In order to effectively petition the court for a temporary restraining order ("TRO"), the requesting party must demonstrate immediate and irreparable harm. If it finds that the requesting party met their burden, the court may issue the TRO without providing notice to the opposing party. TRO's however, only remain

effective for 10-14 days depending on the jurisdiction and the court must then provide notice to the other party and set a court date to hear arguments on whether to issue a Preliminary Injunction.

In this case, the USFS approved a development project in the Scenic National Forest that would require the clearing of 5,000 acres of old-growth forest that is home to a very high concentration of wildlife. The USFS has awarded the project to a logging company and the logging company has indicated that once it receives its permit, it will begin cutting down trees immediately.

Based upon the harm that is being threatened – the loss of 5,000 acres of forest and potential destruction of a high concentration of wildlife's home – the nonprofit organization may be able to demonstrate irreparable harm in the absence of a TRO. Additionally, due to the logging company's statement that upon receipt of its permit it will immediately begin cutting down trees, the nonprofit would most likely be able to demonstrate that the harm is also immediate.

Due to the immediacy and severity of harm that is being threatened, a court would most likely issue a TRO preventing the USFS from issuing a permit before it can hear arguments at the Preliminary Injunction hearing.

- B. The nonprofit could argue that the court issue a preliminary injunction pending the outcome of the trial.

In order to successfully obtain a preliminary injunction ("PI"), the requesting party must demonstrate irreparable and immediate harm; that it would most likely prevail on the merits of the case; that upon weighing the interests of the parties, a PI is warranted; and that a PI would benefit the public.

1. As discussed above, the nonprofit would be able to demonstrate irreparable and immediate harm.
2. The nonprofit would most likely be able to demonstrate that the nonprofit would prevail on the merits of the case.

In this case, the USFS approved a very significant and potentially destructive development project without first conducting an environmental evaluation or preparing an environmental impact statement according to the National Environmental Policy Act guidelines. The forest is hundreds of years old, spans approximately 5,000 acres, and is home to a higher concentration of wildlife than can be found anywhere else in the western United States. The nonprofit is seeking a permanent injunction to enjoin the USFS from issuing a permit until an environmental impact statement is conducted. Based upon the USFS's failure to comply with a federal act, the nonprofit would most likely win on the merits of their case.

3. Upon weighing the interests of both parties, the court would most likely find that a PI is warranted.

In this case, the nonprofit is only seeking to enjoin the USFS from issuing a permit until it abides by the guidelines in a federal act. No party's liberty would be significantly infringed and the court would simply be requiring the USFS to abide by protocol before it issues a potentially devastating permit. The court would most likely find that a PI is proper after weighing the interests of the parties.

4. The court would most likely find that the PI would benefit the public at large.

The USFS's proposed development plan would destroy a significantly large portion of federal land and potentially cause serious harm to wildlife in the Scenic National Forest. Preventing that kind of activity until an environmental impact statement has been properly conducted serves the public at large because it is protecting the natural landscape of the western United States.

Based upon the arguments outlined above, the court would most likely grant both the TRO and PI.

**MEE Question 5**

A prison inmate has filed a civil rights lawsuit against a guard at the prison, alleging that the guard violated the inmate's constitutional rights during an altercation. The inmate and the guard are the only witnesses to this altercation. They have provided contradictory reports about what occurred.

The trial will be before a jury. The inmate plans to testify at trial. The guard's counsel has moved for leave to impeach the inmate with the following:

- (a) Twelve years ago, the inmate was convicted of felony distribution of marijuana. He served a three-year prison sentence, which began immediately after he was convicted. He served his full sentence and was released from prison nine years ago.
- (b) Eight years ago, the inmate pleaded guilty to perjury, a misdemeanor punishable by up to one year in jail. He paid a \$5,000 fine.
- (c) Seven years ago, the inmate was convicted of felony sexual assault of a child and is currently serving a 10-year prison sentence for the crime. The victim was the inmate's daughter, who was 13 years old at the time of the assault.

The inmate's counsel objects to the admission of any evidence related to these three convictions and to any cross-examination based on this evidence.

The guard also plans to testify at trial. The inmate's counsel has moved for leave to impeach the guard with the following:

- Last year, the guard applied for a promotion to prison supervisor. The guard submitted a résumé to the state that indicated that he had been awarded a B.A. in Criminal Justice from a local college. An official copy of the guard's academic transcript from that college indicates that the guard dropped out after his first semester and did not receive a degree.

The guard's counsel objects to the admission of this evidence and to any cross-examination based on this evidence.

The transcript and the résumé have been properly authenticated. The trial will be held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

1. What evidence, if any, proffered by the guard to impeach the inmate should be admitted? Explain.
2. What evidence, if any, proffered by the inmate to impeach the guard should be admitted? Explain.



**MINNESOTA BAR EXAMINATION  
JULY 2014  
REPRESENTATIVE GOOD ANSWER  
MEE5**

1. A testifying witness may be impeached by evidence of prior criminal convictions. If the prior conviction was for a crime involving dishonesty or false statement, evidence of the crime is generally admissible for impeachment whether a misdemeanor or felony. Otherwise,, impeachment is generally limited to evidence of a felony conviction from within the past ten years (time calculated from when the witness was released from prison, if prison time was assessed, not by the date of conviction). The federal rules consider any crime a felony if it can be punished by more than one year in prison. General balancing rules for evidence still apply; the conviction won't be admitted if it's substantially more prejudicial than it is probative of the witness' honesty. Older convictions may be used, but the rule of admission under rule 403 is flipped: the evidence must be substantially more probative than it is prejudicial. While generally only felonies may be admitted, misdemeanors can be used if they have a tendency to show dishonesty: misdemeanor battery wouldn't qualify, but larceny by trick, embezzlement, and similar crimes would. Finally, there is a special rule for convictions arising for sexual assault or abuse. While prior bad acts and similar character evidence can be offered for purposes of impeachment, such evidence cannot be offered to show a propensity to commit bad acts. For evidence of prior sexual assaults, however, such prior bad acts can be introduced to show a propensity to commit similar acts. For each of these, when a witness is impeached by prior conviction, the witness may be questioned on cross-examination about the conviction, and the conviction itself may be introduced into evidence, aside from the witness's testimony on it.

For the inmate's marijuana conviction (assuming he testifies), because he was released from prison less than ten years ago, this falls within the 'last ten years' portion of the rule. His prior sale of marijuana will likely have little impact on the jury's assessment of his honesty, but will also not unduly prejudice him: society does not look down on marijuana distribution in the way it once did, and much of society does not take the sale of marijuana as an indication of bad character. This conviction may be offered into evidence and is a proper topic for cross-examination.

The perjury conviction is clearly admissible to impeach the inmate. Despite the fact that the crime was a misdemeanor (only allowing up to a year to jail time, no more), and the fact that inmate served no time, perjury is a crime that will clearly and always help inform a jury's thinking on a witness's propensity to tell the truth. Perjury is the clearest example of a dishonesty crime: it speaks directly to the witness's willingness to lie under oath. The perjury conviction will be admissible to impeach, both on cross-examination and by extrinsic evidence of the conviction.

The sexual assault will not be admissible. While such convictions are admissible to show a propensity to commit further sexual assaults, that doesn't appear to be an issue in inmate's case. The conviction, like any conviction, could be used to impeach and show a general willingness of the inmate to be dishonest, but in this case, the facts of the conviction are highly prejudicial. Once a jury knows a man is a child molester, who, no less, prayed on his own daughter, they will be very unlikely to rule in his favor in any case, even one having nothing to do with that crime. Some may feel that whatever a guard does to him during his period of incarceration is still not punishment enough. Due to the highly prejudicial nature of this conviction, which fully outweighs its small probative value on the one issue for which it may be offered (inmate's credibility); this conviction will not be admitted. Additionally, once the guard has introduced two convictions, including one for a crime of dishonesty, the court may ask how much is to be gained from adding this additional conviction: does it really throw further light on the inmate's willingness to lie, or is it merely cumulative of the other two convictions.

2. A testifying witness may be impeached by references to prior instances of that witness's dishonesty, even instances of dishonesty which are completely unrelated to the case. However, the impeaching party may not seek to prove prior dishonesty by extrinsic evidence; instead, they must accept the witness's answer on the stand when confronted with an old lie. This is because allowing extrinsic evidence would invite the court to track down matters completely collateral to and unrelated to the underlying litigation, a massive waste of judicial resources.

In this case, the inmate may impeach the guard (assuming he follows through on his plan to testify) by asking about his application for a promotion and his actual record at the local college. He can do this easily via leading questions ('Did you apply for that promotion,' 'did you say you'd earned a degree from the local college,' 'but that's not true, is it, because you dropped out,' etc.). This is a prior act of dishonesty, completely proper for cross-examination and impeachment. However, the inmate may not introduce the transcript or the resume for the purpose of impeachment. These documents are collateral evidence, not relevant to the underlying case. This is exactly the sort of evidence the federal rules seek to bar, so as to not redirect the court's attention from matters at the core of the case. Inmate may ask questions about the prior application, but must accept whatever answers the guard gives; he cannot use extrinsic evidence to show the guard's prior dishonesty.

### **MEE Question 6**

Mega Inc. is a publicly traded corporation incorporated in a state whose corporate statute is modeled on the Model Business Corporation Act (MBCA). Mega's articles of incorporation do not address the election of directors or amendment of the bylaws by shareholders.

Well within the deadline for the submission of shareholder proposals for the upcoming annual shareholders' meeting, an investor, who was a large and long-standing shareholder of Mega, submitted a proposed amendment to Mega's bylaws. The proposal, which the investor asked to be included in the corporation's proxy materials and voted on at the upcoming shareholders' meeting, read as follows:

Section 20: The Corporation shall include in its proxy materials (including the proxy ballot) for a shareholders' meeting at which directors are to be elected the name of a person nominated for election to the Board of Directors by a shareholder or group of shareholders that beneficially have owned 3% or more of the Corporation's outstanding common stock for at least one year.

This Section shall supersede any inconsistent provision in these Bylaws and may not be amended or repealed by the Board of Directors without shareholder approval.

Mega's management decided to exclude the investor's proposal from the corporation's proxy materials and explained its reasons in a letter to the investor:

The investor's proposed bylaw provision would be inconsistent with relevant state law because the Board of Directors has the authority to manage the business and affairs of the Corporation. Generally, shareholders lack the authority to interfere with corporate management by seeking to create a method for the nomination and election of directors inconsistent with the method chosen by the Board of Directors.

Furthermore, at its most recent meeting, the Board of Directors unanimously approved an amendment to the Corporation's bylaws that provides for proxy access for director nominations by a shareholder or a group of shareholders holding at least 10% of the Corporation's voting shares for at least three years. This procedure takes precedence over any nomination methods that might be sought or approved by shareholders.

The investor is considering bringing a suit challenging management's refusal to include the investor's proposed bylaw provision and challenging the board's amendment of the bylaws at its recent meeting.

1. Is the investor's proposed bylaw provision inconsistent with state law? Explain.
2. If the investor's proposed bylaw provision were approved by the shareholders, would the bylaw amendment previously approved by the board take precedence over the investor's proposed bylaw provision? Explain.
3. Must the investor make a demand on Mega's board of directors before bringing suit? Explain.

**MINNESOTA BAR EXAMINATION  
JULY 2014  
REPRESENTATIVE GOOD ANSWER  
MEE6**

**1. Is the investor's proposed bylaw provision inconsistent with state law?**

The investor's proposal is not inconsistent with state law. The issue is who has the authority to create methods for nomination and election of directors. The authority to nominate and elect directors is vested in Shareholders. Directors are then responsible for electing Officers. Articles of incorporation generally control over bylaws. However, because the articles of incorporation do not address the election of directors, the investor (as a shareholder) may propose a method by which director's should be elected. It is true that directors have authority to manage the business and affairs of the corporation, but because shareholders are the "owners" of the corporation, they have the power to nominate and elect directors. Therefore, the investor's proposal is not inconsistent with state law.

**2. Would Amendment by the Board take precedence?**

The Board's amendment would not take precedence over the investor's proposal, if approved. The issue is whether the board may unilaterally amend the bylaws without shareholder approval. Directors need shareholder approval if they are making fundamental changes to the corporation. Because state law vests the power to nominate and elect directors with the shareholders, any amendments or changes to this procedure should be considered a fundamental change requiring shareholder approval. The Board should not be able to unilaterally amend the bylaws with regard to nomination and election of directors. Therefore, if the investor's proposed bylaw provision were approved by the shareholders, the bylaw amendment previously approved by the board would not take precedence.

**3. Must Investor make demand?**

The investor need not make a demand on the board of directors before bringing suit to enforce his right to introduce a proposal; but he may need to bring a demand to challenge the board's amendment of the bylaw. The issue is whether the suit relates to a right held by the shareholder or a right held by the company. A shareholder must make a demand on the board of directors when it seeks to enforce or uphold the rights or interests of the corporation. Shareholders need not make a demand on the board of directors when they are seeking to enforce or uphold a personal right as shareholder. Here, the shareholder is seeking to exercise his right as a shareholder to submit a proposal for the upcoming annual meeting. He is arguing that the board violated this personal right by refusing to include the proposal in the proxy materials. Therefore, he need not make a demand on the board of directors to bring this claim.

However, he may need to bring a demand to challenge the board's amendment of the bylaws if he is suing on an argument that the directors breached their duty of care or loyalty to the corporation by unilaterally amending the bylaws without the approval of the shareholders. The duties of care and loyalty are owed by the directors to the corporation, and shareholders may sue to enforce these rights on behalf of the corporation. The prerequisite to such a suit is that the shareholder make a demand on the board, unless the demand would be futile. The shareholder may argue that the demand is futile because the director's unanimously approved the amendment to the bylaws, and are unlikely to agree that they have violated their duties of loyalty or care to the corporation. The shareholder therefore has some basis upon which to argue that a demand would be futile.